Ong Siew Im Pamela v Majlis Peguam & Ors

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 17–10–95
VINCENT NG J
26 JULY 1995

Civil Procedure *— High Court — Inherent jurisdiction — When ousted by legislation — Whether provisions for time mandatory or directory*

Civil Procedure *— Time — Abridgement — Posting of notice on notice boards of High Courts that petitioner had filed petition for admission to the Bar under s 15(5) of Legal Profession Act 1976 — Notice not posted on notice board of one High Court within time — Whether time could be abridged — Whether court had inherent jurisdiction to allow abridgement — Legal Profession Act 1976 s 15(5)*

Legal Profession *— Admission — Petition for admission — Posting of notice on notice boards of High Courts that petition had been filed — Time — Abridgement — Legal Profession Act 1976 s 15(5)*

The petitioner had posted the notice on the notice boards of 14 out of 15 High Courts in Malaya that the petitioner had filed her petition for admission to the Malayan Bar, as required under s 15(5) of the Legal Profession Act 1976 ('the Act'). The failure to post the notice on the notice board of the High Court at Shah Alam was not caused by any fault on the part of the petitioner since she had no control over the actual carrying out of such posting. The applicant had in fact complained to the Registrar of the High Court twice on behalf of the petitioner, her chambering pupil.

The applicant made this application on behalf of the petitioner for abridgement of the time of posting the notice. The respondent conceded that the present case was a proper case in which the court could exercise its discretion in the applicant's favour provided the court had inherent jurisdiction to abridge time.

The issue was therefore whether the court had inherent jurisdiction to abridge time and if the answer was no, whether the provision itself was clear and unambiguous as to the required period of time that the notice must remain posted.

Held, dismissing the application:

(1) As the sole justification for the very existence of a court of justice was essentially its function of dispensing justice at all times according to the statute and case laws of the land but largely as interpreted in the light of principles of natural justice and fair play, its inherent jurisdiction was jealously and preciously guarded.

(2) Although the court may only exercise its inherent jurisdiction sparingly, especially in the absence of any specific provision in the rules to meet the relief sought, such inherent jurisdiction could only be ousted by express or implied provision in the statute.

(3) The ousting provision must be expressed in clear and unambiguous language. If the language was not clear or was ambiguous it would be necessary and incumbent upon the court, taking the purposive approach, to carefully scrutinize the wording of the provision to glean Parliament's implied intention, so as to endow and clothe such provision with some degree of clarity and purpose.

(4) The terms in s 15(5) of the Act were clear and unambiguous and the court had no jurisdiction to abridge the time.

(5) Section 25(2) of the Courts of Judicature Act 1964 could not be used to invoke the court's inherent jurisdiction in this case as the court could only extend time if the Act itself vested such jurisdiction in the court.

(6) As ss 15(3) and 16(1) of the Act expressly gave power to the court to abridge time whereas s 15(5) was silent in that regard, such silence could not be ignored or dismissed by the court as an oversight in draftsmanship. Rather, the glaring contradistinction in the three provisions only showed the legislature's deliberate intention to bar the court's exercise of any inherent jurisdiction to abridge time.

(7) Time frames whenever and wherever enacted were always mandatory rather than directory, though if the relevant provision was equivocal. It was nevertheless the duty of the court to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

[Bahasa Malaysia summary

Pempetisyen telah meletakkan notis pada papan notis 14 daripada 15 Mahkamah Tinggi di Malaya bahawa pempetisyen telah memfailkan petisyennya untuk diterima masuk sebagai seorang peguambela dan peguamcara Mahkamah Tinggi Malaya, seperti yang dikehendaki di bawah s 15(5) Akta Profesyen Undang-Undang 1976 ('Akta itu'). Kegagal meletakkan notis itu pada papan notis Mahkamah Tinggi Shah Alam bukan salah pempetisyen memandangkan bahawa beliau tidak kawalan ke atas kerja meletakkan notis itu. Pemohon pada hakikatnya telah mengadu kepada Pendaftar Mahkamah Tinggi dua kali bagi pihak pempetisyen, pelatihnya.

Pemohon membuat permohonan ini bagi pihak pempetisyen untuk perlanjutan masa bagi meletakkan notis itu. Penentang mengakui bahawa kes ini adalah satu kes yang berpatutan di mana

A mahkamah boleh menjalankan budi bicaranya memihak pemohon asalkan mahkamah mempunyai bidang kuasa sedia ada untuk melanjutkan masa.

Isunya adalah sama ada mahkamah mempunyai bidang kuasa sedia ada untuk melanjutkan masa dan jika jawapannya adalah B tidak, sama ada peruntukan itu adalah jelas dan tidak kabur tentang tempoh masa di mana notis itu mesti kekal pada papan notis.

Diputuskan, menolak permohonan itu:

(1) Oleh kerana justifikasi tunggal untuk kewujudan sebuah C mahkamah keadilan adalah fungsinya memberikan keadilan pada semua masa mengikut statut dan undang-undang kes negara tetapi sebahagian besarnya seperti ditafsirkan menurut prinsip-prinsip keadilan asasi dan kesaksamaan, bidang kuasa sedia adanya dijaga dengan ketat.

(2) Walaupun mahkamah cuma boleh menjalankan bidang kuasa D sedia adanya sekali-sekala, terutama sekali dalam ketiadaan apa-apa peruntukan spesifik di dalam peraturan untuk memenuhi relief yang dipohon, bidang kuasa sedia ada sedemikian cuma boleh diketepikan oleh peruntukan nyata atau tersirat dalam statut.

E (3) Peruntukan yang mengetepikan bidang kuasa itu mesti dinyatakan dalam bahasa yang jelas dan tidak taksa. Jika bahasa yang digunakan tidak jelas atau taksa, mahkamah perlu, dengan menggunakan kaedah 'purposive', menelitikan perkataan-perkataan peruntukan itu untuk memperolehi niat tersirat Parlimen, supaya dapat memberikan peruntukan itu sedemikian F sedikit sebanyak kejelasan dan tujuan.

(4) Syarat-syarat di dalam s 15(5) Akta itu adalah jelas dan tidak taksa dan mahkamah tidak mempunyai bidang kuasa untuk melanjutkan masa.

G (5) Seksyen 25(2) Akta Mahkamah Kehakiman 1964 tidak boleh dipakai untuk menggunakan bidang kuasa sedia ada mahkamah di dalam kes ini kerana mahkamah cuma boleh melanjutkan masa jika Akta itu sedirinya memberikan bidang kuasa sedemikian kepada mahkamah.

(6) Oleh kerana ss 15(3) dan 16(1) Akta itu secara nyata H memberikan kuasa kepada mahkamah untuk melanjutkan masa sedangkan s 15(5) tidak menyatakan apa-apa dari segi itu, kesepian itu tidak boleh tidak diendahkan atau ditolak oleh mahkamah sebagai kesilapan dalam penggubalan. Sebaliknya, perbezaan ketara di dalam ketiga-tiga peruntukan itu cuma I menunjukkan niat sengaja badan perundangan tidak membenarkan mahkamah menggunakan apa-apa bidang kuasa sedia ada untuk melanjutkan masa.

(7) Tempoh masa di mana sahaja dijadikan undang-undang selalunya mandatori dan bukan bersifat arahan, biarpun jika

peruntukan itu adalah taksa. Namun demikian adalah menjadi tugas mahkamah untuk cuba memperolehi niat sebenar badan perundangan dengan menelitikan keseluruhan skop statut yang mesti ditafsirkan.]

Notes

For cases on time in civil procedure, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 3545–3585.

For cases on the inherent jurisdiction of the court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 2188–2190).

Cases referred to

Barker v Palmer (1881–2) 8 QBD 9 (folld)

Au Kong Weng Joseph v Bar Council & Ors (Originating Summons No R8-177-9-1989) (unreported) (folld)

Lee Lee Cheng v Siow Peng Kwang [1958] MLJ 271 (folld)

Petition for Admission of Lee Hock Seng [1972] 1 MLJ xxvii (not folld)

Petition for Admission of Lam Sek Fah [1972] 1 MLJ xxvii (folld)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494 (refd)

Suppuletchumi a/p Karpaya v Palmco Bina Sdn Bhd [1994] 2 AMR 1191 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)

Legal Profession Act 1976 ss 13(3), 15(3), (5), 16(1)

Rules of the High Court 1980 O 92 r 4

Gerard Chan Weng Yew (*Lim Kean Siew & Co*) for the applicant.

Jeleha bte Abu Baidah (Senior Federal Counsel) for the respondent.

Vincent Ng J: The applicant had made this application (encl 9) on behalf of her chambering pupil, one Lau Chow Ong (the petitioner), for abridgment of the time of posting the notice on the notice boards of all the High Courts in Malaya, as required under s 15(5) of the Legal Profession Act 1976 (the Act) intimating that the petitioner has filed her petition for admission to the Malayan Bar; in particular, posting on the notice board of the Shah Alam High Court.

The senior federal counsel objected to this application on the grounds that this court has no inherent jurisdiction to abridge time.

To clearly and simply draw the battle lines between the parties, it may perhaps be pertinent here to first state the following factors of common ground in the application:

(i) Postings on the notice boards of 14 out of 15 High Courts in West Malaysia had been duly carried out in accordance with s 15(5) of

A the Act, save that in respect of the High Court at Shah Alam, as at the date of hearing of this application, the requisite notice had remained posted from 2 June 1995, ie for a period of over one month, which is about two months short of the three months requisite period of posting. As such, compliance with s 15(5) of the Act had been virtually completed though not completely carried B out by the applicant.

(ii) The act of posting of such notice on each of the notice boards of the High Courts is effected by the various High Courts and as such the applicant would have no control over the actual carrying out of such posting.

C (iii) The applicant had written two letters dated 9 April 1995 and 12 April 1995 to the senior assistant registrar of the High Court, Kuala Lumpur to complain that she had yet to receive the certificate of posting of the said notice.

(iv) In the exercise of its sole discretion empowered by s 13(3) of the D Act, the Bar Council had exempted the petitioner from a period of five months pupillage.

(v) For the above reasons, and in perceptive anticipation of this court's views on the factual merits of the current application, the senior federal counsel, Puan Jeleha binti Abu Baidah, correctly conceded E that this was a proper case in which the court could exercise its discretion in the applicant's favour, but provided that the court is clothed with inherent jurisdiction under the law to do so.

(vi) Both the Bar Council and the Penang Bar Committee vide their letters dated 6 July 1995 (encl 14) and 10July 1995 (encl 11) F respectively, have stated their non-objections to this application.

As the sole justification for the very existence of a court of justice is essentially its function of dispensing justice at all times (nay, not even at times to dispense with justice) according to statute and case laws of the land but largely as interpreted in the light of the principles of G natural justice and fair play, its inherent jurisdiction is jealously and preciously guarded. And, although the court may only exercise its inherent jurisdiction sparingly — and especially in the absence of any specific provision in the rules to meet the relief sought — in order to prevent injustice or abuse of court process, by eg invoking O 92 r 4 of the Rules of the High Court. See *Superintendent of Pudu Prison & Ors v* H *Sim Kie Chon* [1986] 1 MLJ 494 and *Suppuletchumi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 AMR 1191, such inherent jurisdiction could be ousted only when there is expressed or implied provision in the statute to this effect. Also, it is axiomatic that in order to oust the court's inherent jurisdiction, the provision in respect of which the I court's inherent jurisdiction is sought to be invoked, has to be expressed in clear and unambiguous language; for indeed if the language in a particular provision is not clear or is ambiguous it would be necessary and incumbent upon the court, taking the purposive approach, to

carefully scrutinise the wording of the provision to glean Parliament's implied intention, so as to endow and clothe such provision with some degree of clarity and purpose. A

Let us now in the current application examine the two crucial issues for the court's determination, namely, whether the court has inherent jurisdiction to abridge time; and if the answer is in the negative whether the provision itself is clear and unambiguous as to the required period of time that the notice must remain posted. B

Section 15(5) of the Legal Profession Act 1976 reads as follows:

> The petitioner *shall* file his petition at the Registrar's Office at the Central Registry accompanied by notices intimating that he has so petitioned; *such notices shall be posted and continue* to be posted at all the High Courts for three months before the petitioner is admitted and enrolled as an advocate and solicitor. C

The senior federal counsel argued that the words 'shall' in s 15(5) connotes a mandatory and not directory provision, and the court may abridge time only as expressly provided in s 15(3) and s 16(1) of the same Act which read as follows: D

> Section 15(3)
>
> Every petitioner shall, not less than 14 days before his petition is to be heard *or such shorter period as the court may allow*, file an affidavit ... E
>
> Section 16(1)
>
> A copy each of the petition and the affidavit required to be filed under section 15 together with the true copies of each document exhibited pursuant to that section shall, within seven days of the filing thereof in the Registrar's Office, and not less than ten days or *such shorter period as the court may allow* ... F

According to the senior federal counsel, since s 15(5) is silent about the court's power to abridge time, the court has no inherent jurisdiction to do so.

The applicant's counsel, Mr Gerard Chan, submitted that the court has inherent jurisdiction to abridge time. He cited item 8 of the Schedule to s 25(2) of the Courts of Judicature Act 1964 which reads as follows: G

> Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made after the expiration of the time prescribed: H
>
> Provided that this provision shall be without prejudice to any written law relating to limitation.

He further submits that any apparent conflict would be resolved by s 4 of the same Act which states that 'in the event of inconsistency or conflict between this Act and other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.' I

A The senior federal counsel referred the court to the case of *Lee Lee Cheng v Siow Peng Kwang* [1958] MLJ 271 to support her contention that the provisions of the Courts of Judicature Act could not be used to invoke the court's inherent jurisdiction in this case as the court can only extend time if the Act itself vested such jurisdiction in the court. I agree.

B In that case Barakbah J in dealing with item 12 of the Second Schedule to the Courts Ordinance 1984 of Malaya which is similar to item 8 of the Schedule to s 25(2) of the Courts of Judicature Act 1964 stated:

> C Now, what I have to decide is whether this court has power to enlarge the time. Mr Dharmananda, for the plaintiff, in his submission stated that this court had power to enlarge the time and referred to item 12 in the Second Schedule of the Courts Ordinance 1948. It reads as follows:
>
> '12 Jurisdiction to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although D any application therefor be not made until after the expiration of the time prescribed.'
>
> He further stated that there was no similar provision in the English Acts, and therefore was unable to produce authorities to support the contention.
>
> In reply, Mr Huntsman, for the defendant, submitted that item 12 E was merely declaratory. It declared the court's power to extend the time where there was express provision in the law to do it. With this view, I am inclined to agree. This item 12, in my opinion, merely sets out the jurisdiction of the High Court, namely, the scope of authority to deal with certain matters expressly provided for by the law, and the court could enlarge the time only where there was express provision in the law to that effect, as for instance, among others, the Land Acquisition F Enactment (Cap 140), s 22(3) and (4) and s 5(1) of the Japanese Judgments and Civil Proceedings Ordinance 1946, where the law specifically provides the power of enlargement by the court. In my view, item 12 does not give general power of enlargement to the court.

Clearly item 8 of the Schedule to s 25(2) even when buttressed by s 4 G of the Courts of Judicature Act is of no assistance to the applicant, as it is the accepted view that the Schedule merely sets out the scope of authority of the High Court to deal with certain matters expressly provided by the law, and indeed the proviso thereof also states that the provision shall be without prejudice to any written law relating to limitation.

H I am of the considered view that as s 15(3) and s 16(1) of the Act expressly gives power to the court to abridge time whereas s 15(5) is silent in this regard, such silence cannot be ignored or dismissed by the court as to an oversight in draftsmanship; rather the glaring contradistinction in the three provisions only goes to show the I legislature's deliberate intention to bar the court's exercise of any inherent jurisdiction to abridge time. Furthermore, it is trite that time frames whenever and wherever enacted are always mandatory rather than directory, though if the relevant provision is equivocal, it is

nevertheless still the duty of the court to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed (see p 29 of *Statutory Interpretation* (2nd Ed) by FAR Bennion.

The precursor of our local cases, on the question of statutory provisions with respect to time, would appear to be the English case of *Barker v Palmer* (1881) 8 QBD 9. This case concerned O VIII r 7 of the County Court Rules 1875 which stipulated that 'the summons in an action brought to recover lands shall be delivered to the bailiff 40 clear days at least before the return day, and shall be served 35 clear days before the return day thereof.' The plaintiff in that case delivered the summons to the bailiff 39 clear days, and the bailiff served it upon the defendant 38 clear days, before the return day. The county judge ruled that the service was good, and gave judgment for the plaintiff. On appeal Grove J held:

> In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the court, and there is no such power here.

Closer home, the question of whether time frames enacted are mandatory or directory was also considered by the High Court in the judgment of Eusoff Chin J (as he then was) in the case of *Au Kong Weng Joseph v Bar Council & Ors* (Originating Summons No R8–177–9–1989) (unreported). This case concerned the question whether the time frames enacted by ss 98 and 99 of the Legal Profession Act are mandatory or directory. The learned judge held:

> I think, without having to labour on the meaning of 'shall' and 'may', the intention of the Act is quite clear in that when it comes to disciplining an advocate and solicitor, the required actions to be taken must be done in the time frames provided for by the Act.

The learned judge went on to say that as long as time frames remained in the statute book, the clear intention is that the time frames are mandatory.

Counsel for the applicant further submitted that if the court has no inherent jurisdiction to abridge the time, this would have the unjust effect of making nugatory the Bar Council's exemption of the petitioner from the period of five months' pupillage; a fortiori, as the exemption was granted in the exercise of their sole discretion under s 13(3) of the Act. In my view, this contention is untenable as the period of posting of the notice, if abridged by the court, would affect third party rights under s 17(1) and (2) of the Act to enter a caveat against the admission of a petitioner. Thus, the mandatory procedure concerning posting of the notice and the personal rights of the petitioner in regard to the period of pupillage could not possibly have any bearing, one to the other.

A It may be of interest to note that there are two sharply contrasting decisions of the High Courts in Singapore on the topic of the court's inherent powers to enlarge or abridge time under the Singapore Legal Profession Act (Singapore LPA), namely:

(a) the case of the *Petition for Admission of Lee Hock Seng* (see [1972] B 1 MLJ xxvii) in the Singapore High Court, in which the Chief Justice allowed an abridgement of the prescribed period of pupillage of the petitioner, made mandatory under s 11(2)(a) of the Singapore Act despite arguments by the counsel for the Law Society of Singapore that the court had no power therein to abridge time; and C

(b) in *Lam Sek Fah's Petition* (Admission of Advocates and Solicitors No 36 of 1971) (see [1972] 1 MLJ xxvii), which dealt with s 14(3) of the Singapore Act (the wording being substantially similar to s 11(2)(a) of that Act requiring posting at the Supreme Court notice board to continue for the period of six months before a D petitioner is admitted as an advocate and solicitor. Therein, Tah Ah Tah J (as he then was) correctly held that:

(i) the Singapore Act did not vest in the court powers to shorten the period of notice under s 14(3) thereof.

ii) the 'inherent jurisdiction' argument can only apply if the statute E itself (ie the Singapore Act) had vested in the court in clear terms a discretion in the matter.

Hence, it is said that the last word on the inherent powers of the court to abridge time under the Legal Profession Act has yet to be uttered. F However, after considering the rationale in English case laws in conjunction with *Joseph Au Kong Weng* and *Lee Lee Cheng*, I am inclined to adopt the views taken by Tan Ah Tah J in *Lam Sek Fah*. The law on the question of the court's jurisdiction to abridge or enlarge the time is thus pretty well settled in Malaysian courts. I am sure the Bar Council and the Penang Bar Committee would have registered their objections G to this application had they undertaken a proper study on the law pertaining to this issue, as the Singapore Law Society had done in the *Petition for Admission of Lee Hock Seng*. Unfortunately, as it turned out this court and the Attorney General's Chambers were left to delve into and to discover the prevailing law as discussed above.

H I shall now turn to the second issue whether the period of posting has been clearly fixed by the Act. Section 15(5) states that 'such notices shall be posted and continue to be posted at all High Courts for a period of 3 months before the petitioner is admitted and enrolled as an Advocate and Solicitor.' As such, it is crystal clear beyond peradventure, not only that the notices shall be posted but also that such notices shall I continue to remain posted for the stipulated period of three months — both the duty to give notice and the period requirement is intended to be mandatory. And, as this particular section is bereft of any express

provision for the court to abridge the period of posting, the court clearly has no express or inherent powers to do so.

In conclusion, I find the terms in s 15(5) to be clear and unambiguous and hold that the court has no jurisdiction to abridge the time. I therefore dismiss this application.

Application dismissed.

Reported by Victor T Gidwani